In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 464

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

In this case the Federal Trade Commission filed a complaint containing two counts charging various companies which sold rigid steel conduit, certain trade associations, and certain officers of such respondents with violating Section 5 of the Federal Trade Commission Act. Count I charged that the respondents there named were parties to a combination and conspiracy to sell rigid steel conduit under a delivered-price, basing-point pricing formula which resulted in identity in the sellers' delivered prices at every destination (R. 14–18). Count II did not allege combination or

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conspiracy, but it charged that each respondent there named, irrespective of the place from which he shipped his goods, sold rigid steel conduit at delivered prices computed by the use of a formula composed of a basing point price at one or more specified basing points plus freight therefrom, and that the use of this method of pricing necessarily resulted in uniformity in the respondents' delivered prices at any given destination (R. 18–20).

The Commission, after a hearing, made detailed findings of fact (R. 3481–3543), and it concluded that the facts which it had found established, with reference to both Count I and Count II of the complaint, that the respondents were using unfair methods of competition in interstate commerce, in violation of Section 5 of the Trade Commission Act (R. 3543). The order entered by the Commission contains a paragraph directing the respondents there named to cease from entering into or carrying out any planned common course of action, understanding, agreement or conspiracy to do certain specified things (R. 3544–6). Another paragraph of the order directs the respondents there named to cease from doing certain specified things "for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill

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nets received on sales to different purchasers" (R. 3547–8). The petition for certiorari seeks review of only this paragraph of the order.

On proceedings to review the Commission's order, the Court of Appeals for the Seventh Circuit unanimously affirmed the order in its entirety (R. 3677–88).

This Court has not heretofore directly ruled upon the application of the Federal Trade Commission Act under facts and circumstances similar to those presented by the Commission's ruling upholding the charges made in Count II of its complaint. The Government believes that this presents an important question of federal law which has not been, but should be, settled by this Court. The question constitutes an element or aspect of a subject which has recently provoked widespread public discussion and controversy and on which a Senate subcommittee (appointed pursuant to S. Res. 241, 80th Cong.) has been holding hearings, namely, the extent to which goods may be sold at delivered prices computed with reference to base prices established for points other than the actual point of shipment, without infringing the prohibitions of the Federal Trade Commission Act or Section 2 of the Clayton Act. The Federal Trade Commission believes that the public interest would be served by having this Court grant the review which is here sought.